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IN THE

Supreme Court of the United States

October Term, 1955

No. 705

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE,

Petitioners;

and

EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE,

Intervening Petitioners,

against

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Counsel for Petitioners.

LOUIS BOEHM,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Norvin Rieser, Milton S. Koblitz, George S. Champlin, E. M. Dart Mfg. Co., Lillian Boehm, Bernard Fein, Kathryn P. Braithwaite and Edward F. Quirke, and the intervening petitioners, Emanuel Josephson, Rubin Slavsky, Raymond Wiley and William W. Lange, bondholders of The Alton Railroad Company (hereinafter termed "Alton"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made and entered herein December 2, 1955 (54-59),* affirming sum-

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* Numbers in parentheses refer to pages in the certified record of proceedings in the Court of Appeals.

mary judgment dismissing the complaint granted by the United States District Court for the Southern District of New York (Murphy, *J.*) and reported at 123 F. Supp. 44 (23-41). The decision of the Court of Appeals, not yet officially reported, appears at pages 21-26 hereof, as an Appendix.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). The basis for federal jurisdiction in the court of first instance was diversity of citizenship (Title 28, United States Code, § 1332).

Questions Presented

This is a creditors' suit against the respondent (B. & O.) in aid of the equivalents of judgment and unsatisfied execution secured by petitioners against Alton. The Court of Appeals held (Appendix, p. 23) that such creditors' suit is "derivative, in effect", that petitioners "stand in Alton's shoes; they have no shoes of their own", and that, therefore, the creditor-petitioners were barred by virtue of the New York short statutes of limitation (N. Y. C. P. A. §§ 48, 49) affecting Alton and, necessarily, would be precluded by virtue of any other defense that could be interposed to any action by Alton. The Court so held in the face of controlling New York decisions clearly holding that such creditors' suit is independent, and not derivative; that no cause of action accrues to the creditor and no statute of limitations begins to operate against him until the return of execution *nulla bona* against the principal debtor, and that only the ten-year statute (N. Y. C. P. A. § 53) is applicable to such creditors' suits. Therefore, the questions presented are:

1. Did the Court of Appeals erroneously disregard and refuse to apply controlling New York law in holding that this creditors' suit in aid of execution was "derivative, in

effect", and was therefore barred when New York statutes of limitation would have barred action by petitioner's principal debtor (Alton)?

2. In so holding, did the Court of Appeals violate the mandate of this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and subsequent decisions, that in diversity cases the Constitution of the United States requires the Federal courts to apply State law?

3. When this action, jurisdictionally based on diversity of citizenship, was begun, was prosecution of petitioners' claims set forth in the complaint herein barred by New York statutes of limitation?

Statutes Involved

Art. 2, § 11, New York Civil Practice Act:

"Mode of computing periods of limitation.

The periods of limitation prescribed by this article, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defense or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party as a plaintiff or a defendant in the particular action or special proceeding. * * *"

Art. 2, § 48, New York Civil Practice Act:

"The following actions must be commenced within six years after the cause of action has accrued:

* * *

8. An action, legal or equitable, by or on behalf of a corporation against a director, officer or stockholder, or a former director, officer or stockholder, if such action is for an accounting, or to procure

judgment on the ground of fraud, or to recover a penalty or forfeiture imposed or to enforce a liability created by common law or by statute unless such action is one to recover damages for waste or for an injury to property or for an accounting in connection therewith in which case such action shall be subject to the provisions of subdivision seven of section forty-nine."

Art. 2, § 49, New York Civil Practice Act:

"The following actions must be commenced within three years after the cause of action has accrued:

* * *

7. An action to recover damages for an injury to property, except in the case where a different period is expressly prescribed in this article."

Art. 2, § 53, New York Civil Practice Act:

"An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

§ 11 of the Bankruptcy Act (11 U. S. C. § 29):

"(e) A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. * * *"

§ 70 of the Bankruptcy Act (52 Stat. 879, 881; 11 U. S. C. § 110):

"(c) * * * The trustee, as to all property in the possession or under the control of the bankrupt at

the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists." (In effect during the Alton bankruptcy proceeding; amended March 18, 1950, c. 70, § 2, 64 Stat. 23, and July 7, 1952, c. 579, § 23, 66 Stat. 429.)

Summary Statement

The basis for federal jurisdiction in the District Court was diversity of citizenship.

Petitioners herein sued representatively for a deficiency of $28,343,750 sustained upon Alton's liquidation in bankruptcy by holders of Alton bonds that had been secured by a first mortgage on all Alton's assets. The courts below granted summary judgment dismissing this action for all practical purposes, because not timely brought.

The defendant B. & O. became the owner of the entire capital stock of Alton in 1931 (5). It is charged with having thereafter, and until the approval of Alton's petition under Section 77 of the Bankruptcy Act (11 U. S. C. § 205) on November 25, 1942, dominated Alton completely and with having gradually milked Alton dry in its own interest, so that, by the time of Alton's bankruptcy, only a shell remained of the competent operating railroad, financed largely by the bondholders' investment, that the defendant

had taken over (5). The manner in which this was accomplished is set out specifically in paragraph "8" of the Consolidated and Amended Complaint herein (5-8).

Respondent served an answer in effect admitting Alton's complete subjection to B. & O., by its avowal that during the period in question "the Alton formed part of the system of railroads comprising the Baltimore & Ohio railroad system" (16).

The mortgage trustee for Alton's bondholders duly filed a blanket claim in their behalf in Alton's bankruptcy proceedings in the full face amount of $45,350,000. Such claim was duly allowed, with interest (10). The bankruptcy proceedings terminated on May 31, 1947, with the entry of a final order directing Alton's dissolution and yielding the bondholders about $375 for each $1,000 bond (37½¢ per $1), and leaving them with an aggregate deficit of $28,343,750 (12).

Such final order specifically preserved and reserved the rights of Alton's bondholders to assert their claims, if any, against B. & O., by directing that their bonds be perforated and stamped with the following legend (11-12):

> "This bond has been perforated and cancelled for all purposes except for purpose of evidencing right of the bearer or registered owner to a claim, if any, against the Baltimore & Ohio Railroad Company."

B. & O.'s wrongs to Alton were committed between 1931 and November 25, 1942, when Alton's petition in bankruptcy was filed and approved. Petitioners' action was commenced May 7, 1952, about five years after the final order in Alton's bankruptcy.

Reasons for Granting the Writ

A. The Decision of the Court of Appeals.

The Court of Appeals agreed with petitioners, and there was no substantial controversy below, in regard to the following propositions: (a) that under New York law judgment and execution returned unsatisfied, or their legal equivalents, are essential conditions precedent to the maintenance of a creditor's suit in aid of execution; (b) that no New York statute of limitations can commence to operate against such a suit until the creditor's claims have been brought into being by such return of process; (c) that where bankruptcy intervenes, a final order in a bankruptcy proceeding, determining that creditors cannot be paid in full from the assets of the principal debtor, is the legal equivalent of execution returned unsatisfied; and (d) that the only New York statute of limitations applicable to such a creditor's claim is the ten-year statute embodied in § 53 of the New York Civil Practice Act.

The Court of Appeals then, paradoxically enough, held (Appendix, p. 23), that petitioners' bill was "derivative, in effect", *i.e.*, "the plaintiffs stand in Alton's shoes; they have no shoes of their own"; that, hence, petitioners' claims against B. & O. were barred when Alton's were; that Alton's claims against B. & O. were governed by the New York three-year or six-year statute (N. Y. C. P. A. §§ 48, 49), and therefore "were not then [*i.e.*, when petitioners sued] available" to petitioners "because, before 1952, the statute of limitations had run with respect to those claims", viz., "Alton's claims against B. & O."

Hence, the legal pivot upon which this entire case turns is whether, under New York law, a plaintiff in a creditor's bill asserts a cause of action belonging to his principal debtor or a cause of action belonging independently to himself.

This action was initiated not only within ten years of the entry of the final order in Alton's bankruptcy, but also within ten years of the filing and approval of Alton's petition. It necessarily follows that if, under New York law, petitioners are asserting an independent cause of action for their own injury, this action was timely brought.

On the other hand, it may be conceded that if petitioners are suing derivatively in Alton's right, the claims asserted were outlawed by New York statute of limitation (New York Civil Practice Act §§ 48, 49) before petitioners' claims as execution creditors even arose.

B. The Impact of the Decision Below.

Directly, this action affects a large number of widely scattered investors holding $45,350,000 face value of first mortgage bonds of Alton. Indirectly, it affects investors everywhere in senior securities of American enterprises whose resources to meet their obligations to creditors cannot be measured, in the event of bankruptcy, until the conclusion of the reorganization process. It involves also, quite basically, aspects of the so-called "Deep Rock" doctrine enunciated by this Court in *Taylor* v. *Standard Gas & Electric Company,* 306 U. S. 307,—for the respondent B. & O., after acquiring all of Alton's voting stock, operated Alton as a mere instrumentality, in B. & O.'s sole interest, disregarding remediless bondholders whose senior contributions served largely to finance Alton's existence, to their injury in an amount exceeding $28,000,000.

By a clearly erroneous refusal to apply New York law, in violation of this Court's mandate in *Erie R. Co.* v. *Tompkins, supra,* and subsequent decisions, these bondholders have been denied all remedy.

Moreover, the decision of the Court of Appeals will be far reaching as a precedent.* The right of creditors, after

* In this connection see 56 Col. Law Rev. 106 (January 1956), where the case at bar has already been equated with a derivative stockholders' action.

judgment and execution or bankruptcy of the debtor, to pursue third persons whose wrongful acts or breaches of duty have contributed to the inability of the principal debtor to pay his debts, is one long recognized by courts of equity everywhere. By holding that such creditors sue in the right of their debtor, and are thus precluded by every defense available against their debtor, the Court of Appeals has drastically reduced and depleted the power of courts of equity and the rights of all execution creditors. For example, absent a specific enabling statute, the decision below, if logically applied, would preclude all creditors' actions to set aside fraudulent or illegal transfers; for, obviously, the transferor in such a transfer cannot recover from the transferee, and if the creditor sues derivatively, and asserts only rights of the transferor (his principal debtor), neither may the creditor.

C. The Decision Below Disregards New York Law Binding upon the Courts of the United States under the Doctrine of *Erie R. Co.* v. *Tompkins* and the Federal Constitution.

(a)

In holding that the plaintiffs in a creditor's bill stand in the shoes of their principal debtor and that their suit is "derivative, in effect", the Court of Appeals disregarded and refused to follow two controlling decisions of the New York Court of Appeals cited by the petitioners. These decisions are *Buttles* v. *Smith,* 281 N. Y. 226, decided in 1939, and *Hastings* v. *Byllesby,* 293 N. Y. 404, decided in 1944. In so doing, it invaded rights that this Court has held, in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 79-80, and subsequent decisions, to be reserved by the Constitution to the State of New York.

In the *Buttles* case a corporation had paid the personal debt of an officer. The New York Court of Appeals held that a judgment creditor of the corporation with execution

"based, substantively, on one or more New York statutes" and by a footnote suggesting "that the instant case is analogous to *Byllesby* rather than *Buttles.*"

Plainly, no statute is relevant to the point here under discussion. The point of distinction made clear by the New York court was that, in the *Buttles* case, as here, the action was by a creditor in aid of execution and, hence, judgment and execution were conditions precedent to the existence of the cause of action and the operation against it of statutes of limitation; whereas the plaintiff in the *Byllesby* case, being the bankrupt's trustee in bankruptcy, truly stood in the shoes of the bankrupt and was governed by the same statutes of limitation as affected the bankrupt.

Since the petitioners here are *creditors,* whereas the plaintiff in the *Byllesby* case was a trustee in bankruptcy of the *debtor,* Judge Frank's footnote suggestion "that the instant case is analogous to *Byllesby* rather than *Buttles*" is incomprehensible.

The New York Court of Appeals held that the plaintiff in a creditor's bill stands in his own shoes and not the shoes of the principal debtor and sues for direct injury to himself and his fellow creditors, which injury cannot occur, and hence no cause of action can accrue, until judgment and execution determine that the creditor cannot be paid from the assets of the principal debtor. (See N. Y. C. P. A., § 11.)

To be sure, the acts of the B. & O. may have injured Alton when they were committed, just as payment of the officer's personal obligation injured the principal debtor in the *Buttles* case. But such acts did not injure the bondholders, according to the above New York cases, until entry of the final order in the Alton bankruptcy proceeding determined that they had in fact been injured thereby. Nor is there anything unusual about the proposition that a single wrongful act or breach of duty may injure different people

at different times and give rise to different causes of action covered by separate and different statutes of limitation.

> "The single wrongful act which is asserted as the basis of recovery may constitute the breach of a number of obligations of diverse nature and origin.
>
> * * *
>
> "Each so-called 'separate and distinct cause of action' becomes in effect a 'count' in the allegation of a single wrong; and whether the statute (of limitations) bars recovery under any count depends upon the nature and origin of the liability asserted in that count".
>
> *Schmidt* v. *Merchants Despatch Transp. Co.*, 270 N. Y. 287, at page 299.

The "nature and origin" of the liability asserted here by the petitioners differs in amount and date of incidence from any claim Alton may have had against B. & O. Regardless of the extent of Alton's damage, petitioners may recover only the deficiency the bondholders as a class sustained when the bankruptcy court wound up Alton's affairs; and only then was it determinable that they had any claim at all against B. & O.

A further settled principle of New York law that the Court below disregarded emphasizes the error of its decision. In New York, statutes of limitation such as are here involved have been held to affect merely the remedy, not the right. In *Hulbert* v. *Clark*, 128 N. Y. 295, the rule was stated as follows (at p. 297):

> "The statute of limitations does not after the prescribed period destroy, discharge or pay the debt, but it simply bars a remedy thereon. The debt and the obligation to pay the same remains, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment."

Even if it be reasoned that this creditors' suit seeks not to recover for injury to the bondholders caused by the wrongful acts of B. & O., but to subject an asset of Alton to petitioners' execution and that such asset is Alton's claim against B. & O., the result under New York law is the same. The claim remains, though three or six year statutes of limitation may operate to prevent maintenance of an action upon it by Alton or one suing in Alton's shoes, *i.e.*, derivatively. It does not follow from the fact that Alton may not sue that petitioners, as execution creditors of Alton, cannot apply so much of such claim as may be necessary to satisfy their deficiency. Since under New York law the claim continues to exist, these petitioners, having sued within ten years of the accrual of their claims under New York law, have proceeded timely against B. & O.

The *Buttles* case so held on its facts, *i.e.*, it permitted an action on behalf of the execution creditor to be maintained eleven years after the wrongful act was done and hence long after the principal debtor was precluded from initiating an action to recover the misappropriated funds.

The Courts below have in effect held that the plaintiff-bondholders' claim against the defendant might be barred by limitations before New York law gave them standing to sue. Even the most foreshortened statutes of limitation are not designed so to preclude redress to those without standing in law, and accordingly helpless, earlier to defend their rights. The decisions below are, petitioners believe, unique in their outlawry of a claim before its accrual under the settled law of the State in which an action based on diversity jurisdiction is brought.

(b)

Although we deem them logically entirely immaterial, brief mention should perhaps be made of three other statements in the opinion of the Court of Appeals which we

believe demonstrate that Court's lack of appreciation of the sharp question here involved.

1. In his opinion Judge Frank refers to what he terms the "harsh and inequitable" New York rule that statutes of limitation continued to operate prior to the bankruptcy, while Alton was "virtually B. & O.'s slave".

In the first place, we think the Court of Appeals erred in respect of the law. We believe the New York rule to be that the statute runs so long as anyone exists who is empowered to assert the particular cause of action. In every case cited, or which we can find, there were minority stockholders who could have acted. A careful search discloses no case holding that statutes of limitation operate during periods of 100% stock ownership of the victim by the wrongdoer, as here; and we suggest that, if the question were squarely presented, the New York courts would hold that the statute is tolled so long as there is no one empowered to prosecute the action. Certainly there is no New York ruling to the contrary. In fact, the New York courts have not hesitated to deny a wrongdoing defendant the benefit of the statute of limitations where such defendant is responsible for the failure to prosecute in time a claim against him. *Dodds* v. *McColgan,* 229 App. Div. 273; *Safrin* v. *Friedman,* 96 N. Y. S. 2d 627, aff'd 277 App. Div. 1138; *In re Meyrowitz' Estate,* 114 N. Y. S. 2d 541, 547 (not officially reported). It is significant that in this line of cases the New York courts relied on no statute, but on the inherent powers of courts of equity to prevent a miscarriage of justice.

However, determination of this question is wholly unnecessary. If, as the Court of Appeals held, this action is derivative, the cause of action was outlawed long before this action was commenced, even if the statute was suspended until November 1942, because Alton's cause of action would be governed by the three or six year statute,

and more than six years elapsed between the appointment of Alton's bankruptcy trustee—who certainly could have asserted any cause of action belonging to Alton—and the commencement of this action. On the other hand, if, as petitioners contend, this creditors' suit is not derivative but is direct, and seeks recovery for injury to the bondholders and not to Alton, it was certainly timely brought, since it was commenced within ten years of the date when it accrued.

2. The Court of Appeals also suggested that the cause of action asserted in the complaint herein could have been maintained by Alton's trustee in bankruptcy.

Of course, if the claims here asserted are derivative, they could have been asserted by the trustee and, as aforesaid, were outlawed long before this action was commenced.

Perhaps Judge Frank had § 70 of the Bankruptcy Act (52 Stat. 879, 881; 11 U. S. C. 110) in mind, providing that the trustee "shall be deemed vested as of [the date of bankruptcy] with all the rights, remedies and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists". This portion of the Act has been held limited to recovery of fraudulent conveyances and preferences; see *In re Jacoby*, 138 F. (2d) 42; *Courtney* v. *Georger*, 228 Fed. 859, cert. den. 241 U. S. 660; and, of course, the New York Court of Appeals so held in the *Byllesby* case.

Incidentally, attention is called to the fact that this statute conclusively demonstrates that Congress when it framed the Bankruptcy Act recognized the distinction that petitioners have so unsuccessfully urged upon the courts below. If an execution creditor claims in the right of his principal debtor, there was no conceivable reason for the above provision. Its presence in the Bankruptcy Act shows that Congress realized that an execution creditor has rights other and greater than those of the bankrupt; *e. g.*, the de-

fendant may not set up defenses—such as estoppels of various kinds, illegality, or short statutes of limitation—which would be available in any suit by or in the right of the bankrupt.

In any event, however, whether or not the bankruptcy trustee could assert a cause of action as though he were a judgment creditor with execution returned unsatisfied is immaterial. This action was instituted within ten years of "the date of bankruptcy", the date as of which the statute vests the trustee with whatever rights he may have. The petition in the Alton bankruptcy was filed and approved November 25, 1942; this action was commenced May 7, 1952, within the ten-year period applicable to creditors' bills. No one can contend that anyone was in existence prior to November 25, 1942, empowered to assert the claims of a judgment creditor with execution returned unsatisfied.

3. The opinion below puts in the petitioners' mouths the "contention that the statute commences to run anew when a claim passes to an assignee of, or successor to, one who could have sued thereon" (58). Petitioners of course made no such contention. This misconception of petitioners' position further accentuates the basic error upon which the Court below proceeded.

Hence, we repeat, the entire case turns upon whether the Court of Appeals correctly decided that a judgment creditor's suit is secondary. If, as we contend, the New York courts have conclusively determined that it is primary, seeks recovery for direct injury to the creditors, and comes into existence only when execution, or the equivalent thereof, is returned unsatisfied, the Court of Appeals is bound by such determination, this action was timely brought, and the Court of Appeals erred in failing and refusing to apply the New York rule.

(c)

In conclusion, we point out that the New York rule for which petitioners contend is in line with sound public policy. Until judgment and execution, the creditor is helpless; he has no cause of action. As here, the defendant may control the principal debtor; they may be in actual collusion; they may have other mutual interests which preclude or discourage action by the principal debtor; the principal debtor may be merely careless and lethargic or loath to litigate. There may be many reasons why the principal debtor fails or refuses to act while the statute runs against him. Such statute may be a short one (there is cogency in B. & O.'s contention below that the three-year statute applied to any claim against it by Alton), or it may be near expiration when the principal debtor's obligation to his creditor first falls due. In the instant case, if the three-year statute applied to any claim by Alton, such period had run its full course before the bondholders had any cause of action; if the six-year statute applied, it was complete, as Judge Frank pointed out, on November 25, 1948, eighteen months after petitioners' cause of action accrued. In many, if not most, cases it would be literally impossible for a creditor to litigate and secure his judgment and execution against the principal debtor and institute his creditor's bill against the defendant before the statute barred his principal debtor's claim. As between the injustice of denying all relief to a helpless though vigilant creditor and the suggestion that early repose is desirable, the equities and dictates of sound public policy favor the rule for which petitioners here contend.

No doubt these considerations were included in the reasons underlying the rule laid down by the New York courts, *i. e.*, that an execution creditor suing a third person for a wrong or breach of duty to his principal debtor does not assert a cause of action belonging to the principal

debtor but stands in his own shoes and sues for injury to himself and his fellow creditors, upon a claim that does not accrue, and thus cannot be affected by any statute of limitations, until the return of execution unsatisfied.

Conclusion

Wherefore, petitioners pray that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be granted.

Dated: New York, February 15, 1956.

Respectfully submitted,

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Louis Boehm,
Nathan B. Kogan,
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Abraham K. Weber,
Of Counsel.

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 13, October Term, 1955.

(Argued October 11, 12, 1955

Decided December 2, 1955.)

Docket No. 23560

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE,
Plaintiffs-Appellants,

—and—

EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE,
Intervening Plaintiffs-Appellants,

—v.—

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Defendant-Appellee.

Before:

FRANK, HINCKS and WATERMAN,
Circuit Judges.

Appeal from a summary judgment of the United States District Court for the Southern District of New York, entered by Judge Murphy. Affirmed.

LOUIS BOEHM AND NATHAN B. KOGAN (Victor Louse, Abraham K. Weber and Spencer Pinkham, of counsel) *for appellants.*

ABRAHAM K. WEBER *for Kathryn P. Braithwaite and Edward F. Quirke.*

LOUIS H. O. FISCHMAN *for intervening appellants.*

CRAVATH, SWAINE & MOORE (Ralph L. McAfee, George M. Billings and Edward C. Perkins, of counsel) *for appellee.*

FRANK, *Circuit Judge*:

The facts are fully stated in Judge Murphy's opinion, 123 F. Supp. 44.

1. In their brief filed in this court, plaintiffs say that their suit is but "an old-fashioned creditors' bill" by "creditors of a corporate principal debtor against its sole stockholder for violation of its fiduciary duties as such stockholder," and that this suit, substantively, rests on no New York statute. Since, then, the basis of the plaintiffs' suit is non-statutory, we need not consider two cases, much discussed by the parties, *Buttles* v. *Smith,* 281 N. Y. 226, and *Hastings* v. *Byllesby,* 293 N. Y. 404, as both those cases involved the application of the New York statute of limitations to claims based, substantively, on one or more New York statutes.[1]

2. A judgment-creditor, with execution returned unsatisfied, may, without relying on a statute, by an "old-fashioned" creditors' bill, have an equitable levy on an

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[1] Assuming, *arguendo,* that the *Byllesby* and *Buttles* cases were applicable, we think that the instant case is analogous to *Byllesby* rather than *Buttles,* and that the plaintiffs would therefore be barred under the rationale of the *Byllesby* case.

available asset of his debtor. The asset may consist of a claim against a third person for a wrong that person did to the debtor. If that wrong be regarded as also done to the creditor, it is only an indirect wrong, and the creditor's suit is derivative, in effect.

However, plaintiffs contend that they suffered a direct and independent injury, apart from that done to Alton, and that a cause of action based on such injury accrued only after they had obtained a judgment with execution thereon returned unsatisfied.[1a] The crucial question here is whether the alleged acts of B & O (a) constitute harms to Alton, and but indirectly to plaintiffs, Alton's bondholders, and/or (b) constitute harms done directly to those bondholders. Absent a statute, we think they clearly came within the first category.

Alton, for these harms, could have held B & O liable; and so could Alton's bankruptcy trustee, as Alton's successor.[1b] Like the trustee, the plaintiffs stand in Alton's shoes; they have no shoes of their own. Significantly, plaintiffs cite no case holding otherwise, absent a statute.

True, while it remained under the domination of B & O, its sole stockholder, Alton, in practical terms, as virtually B & O's slave, could not have brought suit against B & O. But, under the New York statute of limitations as construed by the New York courts, the period of that domination did not suspend the running of the statute. See *Aus-*

[1a] We assume, *arguendo*, that conceivably there might be facts (other than those here) giving rise to such an independent cause of action, even in the absence of a statute, which the creditors could not pursue until they obtained a judgment and execution thereon was returned unsatisfied.

[1b] Cf. *Henderson* v. *Binkley Coal Co.*, 74 F. (2d) 567 (C. A. 2); *Austrian* v. *Williams*, 198 F. (2d) 697 (C. A. 2).

trian v. *Williams,* 198 F. (2d) 697 (C. A. 2); *Laird* v. *United Shipyards,* 163 F. (2d) 12 (C. A. 2).[2]

3. Since plaintiffs do not allege any fraudulent conveyance, the New York Debtor and Creditor Law—which dispenses with a judgment in such circumstances—does not apply. Therefore a suit of this kind, an old-fashioned creditor's suit, could not be maintained until plaintiffs had the equivalent of a judgment against Alton and an unsatisfied execution. Plaintiffs maintain, and we shall assume, that they first occupied that position on May 31, 1947, when the Alton bankruptcy proceedings terminated.[3] The statute of limitations, Section 53 of the New York Civil Practice Act, applicable to such an equitable action, fixes a ten-year period within which suit must be brought; and this suit began on May 7, 1952, within that ten-year period.

These facts, however, do not help plaintiffs. We shall assume that, within the ten years ending May 31, 1957, plaintiffs, by their suit, could levy an equitable execution on any of Alton's available assets, which the final decree in the Alton bankruptcy proceedings permitted plaintiffs to pursue. But, to succeed, plaintiffs must show that those assets on which they seek thus to levy—*i.e.,* Alton's claims against B & O—were available when the suit began in 1952. They were not then available, because, before 1952, the statute of limitations had run with respect to those claims.[4] For the pertinent period of limitations is either

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[2] This interpretation, out of line with the interpretation of similar statutes in many other jurisdictions, seems harsh and inequitable. But, of course, we must abide by what the New York courts say its statutes mean.

[3] That is, they obtained the equivalent of a judgment on the allowance of their bondholder claims in the Alton bankruptcy proceedings; and the termination of those proceedings on May 31, 1947, with part of the amounts due thereon unpaid, was the equivalent of a return of execution unsatisfied.

[4] Our reasoning here differs from that of the district judge. But, in affirming a judgment, of course we may do so for reasons other than those of the court below.

(a) three years, under the New York Civil Practice Act, Section 49 subdivision 7,[5] or (b) six years, under Section 48 subdivisions (1) or (8).[6]

In short, making assumptions most generous to plaintiffs, suit on the claims against B. & O. were barred on November 25, 1948, *i. e.*, six years from the appointment of Alton's bankruptcy trustee on November 25, 1942.

4. To be sure, the trustee was discharged on May 31, 1947. We shall assume that—thanks to the provision of the final decree in the Alton bankruptcy proceedings which gave the bondholders the right to pursue the claims, if any, against B. & O.—plaintiffs succeeded to Alton's right to sue B. & O. which had never been availed of by Alton's trustee. If so, on the most generous assumptions, plaintiffs' suit would not have been barred until November 25, 1948. But plaintiffs did not start suit until 1952.

We cannot accept plaintiffs' contention that the statute commences to run anew when a claim passes to an assignee of, or a successor to, one who could have sued thereon. An assignment, whether or not by "operation of law," has no such resurrective or phoenix-like potency.[7] Nor, since

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[5] Section 49 subdivision 7 includes "an action to recover damages for an injury to property. * * *"

[6] Section 48 subdivision 1 includes an action upon a contract, express or implied, except a judgment and other exceptions not here relevant.

Section 48 subdivision 8 includes derivative actions against present and former directors, officers and stockholders for an accounting, for fraud, or to recover penalties or forfeitures imposed by statute or common law, but specifically excludes actions for waste or injury to property or for an accounting in connection therewith. For these latter actions, reference is made to Section 49 subdivision 7.

[7] *Bucklin* v. *Bucklin*, 1 Abb. Ct. App. Dec. 242, 251; *Cooley* v. *Lobdell*, 153 N. Y. 596, 602-603.

Section 14 of the New York Civil Practice Act makes a specific exception of an action by a principal against his agent, an exception not relevant here.

Alton's trustee in bankruptcy could have asserted these claims, did the pendency of the bankruptcy proceedings toll the statute, since 11 U. S. C. Section 205(b)—which provides that "the running of all statutes of limitations shall be suspended"—has no application to a suit by a bankruptcy trustee. We think 11 U. S. C. Section 29(e) is applicable to railroad reorganization proceedings and carries the only suspension of statutes of limitation running against claims belonging to the debtor's estate.

5. The New York Civil Practice Act, Section 48(5) provides a six-year period of limitations as to actions for fraud, a period which begins to run only from the discovery of the fraud. Plaintiffs, however, do not allege Alton was a victim of the kind of fraud covered by that section as construed in the New York decisions. See *Austrian* v. *Williams, supra; Laird* v. *United Shipyards, supra,* and New York decisions there cited.[8]

Affirmed.

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[8] Even if that statute applied to the fraud here alleged, nevertheless the action would fail. For the discovery—of whatever fraud had been practiced by B & O—occurred on November 25, 1942, the date of the appointment of Alton's bankruptcy trustee.

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1955

No. 705

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE,

Petitioners,

and

EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE,

Intervening Petitioners,

against

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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March 19, 1956

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IN THE

Supreme Court of the United States

October Term, 1955

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE, *Petitioners,* and EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE, *Intervening Petitioners,* *against* THE BALTIMORE & OHIO RAILROAD COMPANY, *Respondent.*	No. 705

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the court of appeals (App. 1a-6a)[1] is reported at 228 F.2d 563. The opinion of the district court (R. 23-41) is reported at 123 F. Supp. 44.

[1]References marked "App." are to the Appendix of this brief; those marked "R.", to the record.

Jurisdiction

The judgment of the court of appeals (App. 7a-8a) was entered December 2, 1955. The petition for certiorari was filed February 18, 1956. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

Question Presented

Whether under the law of New York those torts of mismanagement allegedly committed by respondent against the Alton Railroad Company, would give petitioners, creditors of Alton, an independent cause of action against respondent, not barred by statutes of limitations at the time this action was commenced.

Statement

This litigation consolidates three actions brought by petitioners against respondent in federal court[2], jurisdiction being alleged on the ground of diversity of citizenship (Comp. par. 1; R. 3-4). The first of the three consolidated actions was commenced May 7, 1952.

Petitioners sue in a representative capacity as bondholders of the Alton Railroad Company [Alton] (Comp. par. 3; R. 4), and charge that from January 7, 1931 through November 25, 1942, while all the voting stock of Alton was owned by respondent, it so mismanaged the affairs of Alton as to cause that railroad to become insolvent.

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[2]The United States District Court for the Southern District of New York, which court ordered consolidation of the actions and directed service of a consolidated and amended complaint [complaint] (R. 1-2, 3-14).

Petitioners' charge of mismanagement of the Alton by respondent (Comp. par. 8; R. 5-8), consists of allegations that respondent, during its period of control, diverted traffic from Alton's lines to its own lines; failed to keep Alton's rolling stock in repair; used Alton's tracks, equipment and facilities without paying for such use; diverted purchases of equipment and supplies for Alton from its shippers to respondent's shippers; caused Alton to negotiate unprofitable contracts with the Pullman Company and others; utilized Alton's losses to offset its own profits for tax purposes during the years in which such losses occurred, thereby depriving Alton of an offset against profits later made in its own operations; and discriminated against Alton in dividing revenues on traffic interchanged between them. Those acts, it is claimed, caused damage to Alton in the amount of some $40,000,000 to $50,000,000 and prevented Alton from operating at a profit during the period in question (Comp. pars. 8, 9; R. 6-9).

Petitioners also aver that approval was given November 25, 1942, to a petition of Alton for reorganization under Section 77 of the Bankruptcy Act (Comp. pars. 11-12; R. 9). With that order of approval, control of the Alton by respondent ceased (Comp. par. 12; R. 9-10). During the pendency of the reorganization, application was made to the reorganization court for an order directing the trustee to prosecute those claims against respondent that petitioners now set forth in their complaint; the request was denied (Comp. par. 14; R. 10-11). The reorganization ended May 31, 1947 (Comp. par. 15; R. 11). Although petitioners' claims as bondholders were allowed in full in the reorganization proceeding, the assets of Alton proved insufficient to satisfy them, except to the extent of 37½¢ on the dollar (Comp. par. 16; R. 12).

The first count of the complaint asks damages for the alleged mismanagement of Alton by respondent (Comp. par. 19; R. 13). The second count urges that the alleged mismanagement constituted a fraud upon Alton and its creditors and that petitioners did not discover that fraud until long after November 25, 1942 (Comp. pars. 22, 23; R. 13). Judgment is asked in the amount of at least $28,343,750 (the claimed amount of the deficiency on Alton's bonds) to be distributed, after deducting petitioners' expenses, among Alton's bondholders (Comp. *ad damnum* clauses (b) and (c); R. 13).

Respondent moved the district court for summary judgment, under FED. R. CIV. P. 56(b), on the ground that the claim made in the complaint is barred in its entirety by the New York 3-year statute of limitations [C. P. A. §§ 48(8) and 49(7)] as a claim for corporate waste and/or by the New York 6-year statute of limitations [C. P. A. §§ 47-a and 48(1)] as a claim on a contract obligation. In the alternative, respondent asked for judgment dismissing petitioners' claim in so far as it arose out of events taking place more than 10 years prior to the commencement of the action [May 7, 1952] as barred, in any event, by the New York 10-year statute of limitations applying generally to equity cases [C. P. A. § 53] (R. 21-22).

The district court granted respondent's motion under the 10-year statute (R. 23-41) and entered final judgment dismissing the complaint to the extent that the claims therein arose out of events prior to May 7, 1942 (R. 50-51).

On December 2, 1955, the court of appeals affirmed the judgment of the district court (R. 60-61). In translating the acts alleged in the complaint into a substantive claim under New York law, the court of appeals determined

that claim to be an ancillary one in which petitioners are attempting to levy on an asset of Alton, in the form of a claim against respondent, solely in aid of petitioners' unsatisfied claims against Alton on their bonds (App. 2a-3a). This had also been the conclusion of the district court (R. 24).

The decision of the court of appeals, in one respect, however, goes further than that of the district court. The court below has held that petitioners' claim is governed not by the New York 10-year statute of limitations [C. P. A. § 53] but by either the New York 3-year statute [C. P. A. § 49(7)], respecting actions to recover damages for injury to property, or the New York 6-year statute [C. P. A. § 48(1) or (8)], respecting actions on contracts or judgments; that both such limitations commenced running from the time of appointment of the trustee in the bankruptcy proceeding; and that petitioners' action, having been commenced more than 6 years after the appointment of the trustee, must, therefore, be barred in full (App. 5a).

ARGUMENT

The decision of the court of appeals holds (a) that the alleged acts of respondent, which underlie the claim of petitioners, were harms done directly to Alton and only indirectly to petitioners, Alton's bondholders; (b) that the claim of petitioners is ancillary, therefore, to Alton's claim; and (c) that the privilege of petitioners to assert that ancillary claim against respondent is subject to and barred by the same statutes of limitations that controlled the claim as it lay in the hands of Alton.

Petitioners cite neither reason, case nor statute to contradict the first proposition and, although they make lavish

reference to New York statutes of limitations, they nonetheless allow, in respect of the third proposition that

> ". . . If, as the Court of Appeals held, this action is derivative, the cause of action was outlawed long before this action was commenced. . . ." (Pet. 15)

The nub of the case is, therefore, the second proposition, *viz.*, whether, under New York law,

> ". . . . this creditors' suit is not derivative but is direct. . . ." (Pet 16)

1. Throughout this litigation, petitioners have confused their right of suit—the right given them to maintain a creditors' bill—with the underlying claim of their debtor upon which they purport to levy in such suit. A creditor's right to *recover* in an ancillary proceeding (as distinguished from his right to *maintain* such a proceeding) necessarily presupposes the existence, at the time when the creditors' bill is filed, of an enforceable claim in behalf of the debtor. If no such claim exists, there is not anything upon which the creditors' bill may act.

Petitioners concede that the substantive cause which they assert is not one original with them. As they admit, it inhered long ago in their debtor for harms done that debtor. It exists, therefore, and has vitality now only because and to the extent that it existed in behalf of their debtor and became an asset of their debtor's estate. Petitioners' own interest comes into being solely because a remedy is claimed by them in their capacity as creditors, in aid of their independent claim against Alton in the form of this creditors' bill to levy upon that asset.

Since the cause of action sued upon is one which has devolved upon the petitioners from the Alton, it necessar-

ily comes into their hands subject to whatever infirmities, including the effects of statutes of limitations, may inhere in it. It cannot have more vitality in their hands than it had as an original claim and, if barred by limitations as an original claim when suit was commenced, is not revived by reason of having become the subject of a levy by creditors.

Petitioners seek to avoid all this by contending that, under New York law, statutes of limitations commence to run again whenever a debtor's chose of action devolves to the hands of levying creditors (Pet. 13-14). Needless to say, this thesis is uniformly contradicted by the New York statutes of limitations. Those dealing with real actions expressly state, in every case, that such actions are barred if the plaintiff *or his predecessor in interest* did not commence suit within the statutory period. See, *e. g.*, C. P. A. §§ 31, 33, 34, 37. With respect to personal actions, the New York statutes invariably provide, and almost uniformly state, that the period runs from the time of *accrual* of the cause of action. See *e.g.*, C. P. A. §§ 47, 47-a, 47-b, 48, 49, 50, 51, 53, 55. In the only instance where the rule is to the contrary [C. P. A. § 14, dealing with actions by a principal for the misconduct of his deputy or agent] the legislature explicitly stated that the normal rule should *not* be followed, and that a cause of action should be deemed to accrue only when the principal had been held liable for his agent's act. Compare C. P. A. § 48(5) dealing with actions for fraud and C. P. A. §§ 15(1), 49(4).

The general principle which underlies these statutes (that limitations shall apply to claims themselves and not change with a person becoming competent at one time or another to enforce them) was firmly established for

New York courts more than ninety years ago in *Bucklin* v. *Bucklin*, 1 Abb. App. Dec. 242. That principle is now too well ingrained in the law of New York to be questioned by a federal court, sitting under diversity jurisdiction as a state court. In the *Bucklin* case, the New York Court of Appeals held that a cause of action, arising in favor of a trust estate during the infancy of a beneficiary but not enforced by the trustee, would be barred in the hands of the beneficiary after her majority, despite her own incapacity to sue during earlier years. The court said (1 Abb. App. Dec. at p. 251):

> ". . . . If there are successive owners of the cause of action, or of equitable relief, and the right to prosecute arises in the time of the first, the period of limitation commences at that time, and continues attached to the demand during the several subsequent changes of both; and when the statute period has elapsed, the demand is barred, *though the last proprietor had recently acquired his right*. The statute refers to the time when the right to enforce the particular claim of relief accrued to the person who then possessed that right; otherwise the demand could be kept in force indefinitely by successive devolutions of title." [Emphasis added]

2. In an attempt to bring the judgment below within that compass of considerations which govern review on certiorari by this Court, petitioners urge that the court of appeals has decided an important state question in a way in conflict with applicable law (Pet. 2-3). But if, as they assert (Pet. 7), the legal pivot of this case be whether their claim is derivative or not, then they have failed to show how the judgment below conflicts with any statute or decision of New York.

To demonstrate this failure, we note, at the outset, petitioners' concession that

> ". . . . no statute is relevant to the point here under discussion." (Pet. 12; and see App. 2a)

Therefore, if the alleged conflict with applicable state law exists at all, it must arise by virtue of decisions of the New York courts. Looking to that only other source of possible conflict, we further note, as did the court below, with respect to the conclusion that petitioners' claim devolved to them from Alton, that

> ". . . . Significantly, plaintiffs cite no case holding otherwise, absent a statute." (App. 3a)

Certainly that failure of citation "to cases holding otherwise" is not repaired by the extended discussion (Pet. 9-14) that petitioners devote to two decisions of the New York Court of Appeals, those in the *Buttles*[3] and *Byllesby*[4] cases. Those cases, as was noted by the court below (App. 2a), are totally irrelevant here, because each

> ". . . . involved the application of the New York statute of limitations to claims based, substantively, on one or more New York statutes."

Thus, the *Buttles* case was an action brought by a receiver, as ancillary to sequestration proceedings on behalf of creditors of an insolvent corporation. The complaint stated three separate causes of action, each to set aside alleged fradulent diversions by defendants of the debtor's funds and for an accounting from defendants of property received by them from the debtor. The three separate causes were asserted under Section 15 of the New York

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[3]*Buttles* v. *Smith*, 281 N.Y. 226.
[4]*Hastings* v. *H. M. Byllesby and Co.*, 293 N. Y. 404.

Stock Corporation Law[5]; Section 274 of the New York Debtor and Creditor Law[6]; and Section 60(5) of the New York General Corporation Law.[7].

In the *Byllesby* case, a special trustee, appointed in a Section 77B bankruptcy proceeding, sued in the New York courts to recover from defendant, for the account of creditors, property of the debtor allegedly wasted or taken unlawfully from it, and to recover profits allegedly wrongfully appropriated. The causes of action asserted by the trustee were made under subdivisions 1 and 2 of Section 60 of the New York General Corporation Law[8].

But petitioners, as noted above, do not premise their claim upon any statute of New York. They contend that, not by force of statute, but under the common law of New York, the claim which they assert is independent, and not derivative. Clearly, that question cannot be decided by reference or exegesis upon cases in which the direct or ancillary character of the substantive rights asserted depends upon a statute.[9]

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[5]Prohibiting transfers in contemplation of insolvency and making a participating officer or director personally liable to creditors to the extent of their loss.

[6]Declaring transfers that make working capital inadequate for a specific business or transaction to be fraudulent as to persons becoming creditors during such business or transaction.

[7]Giving to creditors (see Section 61) a right of action against a director or officer of a corporation to set aside transfers made, with knowledge of the transferee, in violation of any law.

[8]Giving to creditors (see Section 61) a right of action against a director or officer of a corporation (1) to account for his official conduct, including management and disposition of the funds and property, committed to his care, and (2) to pay the corporation, or its creditors, any money and the value of any property which he may have disbursed, transferred, lost or wasted, in violation of duty.

[9]Note, however, with respect to the *Buttles* and *Byllesby* cases, that the court of appeals also observed (App. 2a, fn. 1):

> "Assuming, *arguendo*, that the *Byllesby* and *Buttles* cases were applicable, we think that the instant case is analogous to *Byllesby* rather than *Buttles*, and that the plaintiffs would therefore be barred under the rationale of the *Byllesby* case."

Since there is neither legislation nor decisional law in New York remotely suggesting that the claim which petitioners assert against respondent is not a derivative one, it follows that the court below did not decide that pivotal question or, as petitioners concede (Pet. 15), any question corollary to it, in a way in conflict with the applicable law of the State of New York.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 19, 1956

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 13, October Term, 1955

(Argued October 11, 12, 1955

Decided December 2, 1955.)

Docket No. 23560

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE,

Plaintiffs-Appellants,

—and—

EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE,

Intervening Plaintiffs-Appellants,

—v.—

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Defendant-Appellee.

Before:

FRANK, HINCKS and WATERMAN,

Circuit Judges.

Appeal from a summary judgment of the United States District Court for the Southern District of New York, entered by Judge Murphy. Affirmed.

LOUIS BOEHM AND NATHAN B. KOGAN (Victor House, Abraham K. Weber and Spencer Pinkham, of counsel) *for appellants.*

ABRAHAM K. WEBER *for Kathryn P. Braithwaite and Edward F. Quike.*

LOUIS H. O. FISCHMAN *for intervening appellants.*

CRAVATH, SWAINE & MOORE (Ralph L. McAfee, George M. Billings and Edward C. Perkins, of counsel) *for appellee.*

FRANK, *Circuit Judge:*

The facts are fully stated in Judge Murphy's opinion, 123 F. Supp. 44.

1. In their brief filed in this court, plaintiffs say that their suit is but "an old-fashioned creditors' bill" by "creditors of a corporate principal debtor against its sole stockholder for violation of its fiduciary duties as such stockholder," and that this suit, substantively, rests on no New York statute. Since, then, the basis of the plaintiffs' suit is non-statutory, we need not consider two cases, much discussed by the parties, *Buttles* v. *Smith,* 281 N. Y. 226, and *Hastings* v. *Byllesby,* 293 N. Y. 404, as both those cases involved the application of the New York statute of limitations to claims based, substantively, on one or more New York statutes.[1]

2. A judgment-creditor, with execution returned unsatisfied, may, without relying on a statute, by an "old-fashioned" creditors' bill, have an equitable levy on an

[1]Assuming, *arguendo,* that the *Byllesby* and *Buttles* cases were applicable, we think that the instant case is analogous to *Byllesby* rather than *Buttles,* and that the plaintiffs would therefore be barred under the rationale of the *Byllesby* case.

available asset of his debtor. The asset may consist of a claim against a third person for a wrong that person did to the debtor. If that wrong be regarded as also done to the creditor, it is only an indirect wrong, and the creditor's suit is derivative, in effect.

However, plaintiffs contend that they suffered a direct and independent injury, apart from that done to Alton, and that a cause of action based on such injury accrued only after they had obtained a judgment with execution thereon returned unsatisfied.[14] The crucial question here is whether the alleged acts of B & O (a) constitute harms to Alton, and but indirectly to plaintiffs, Alton's bondholders, and/or (b) constitute harms done directly to those bondholders. Absent a statute, we think they clearly came within the first category.

Alton, for these harms, could have held B & O liable; and so could Alton's bankruptcy trustee, as Alton's successor.[15] Like the trustee, the plaintiffs stand in Alton's shoes; they have no shoes of their own. Significantly, plaintiffs cite no case holding otherwise, absent a statute.

True, while it remained under the domination of B & O, its sole stockholder, Alton, in practical terms, as virtually B & O's slave, could not have brought suit against B & O. But, under the New York statute of limitations as construed by the New York courts, the period of that domination did not suspend the running of the statute. See *Aus-*

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[14]We assume, *arguendo*, that conceivably there might be facts (other than those here) giving rise to such an independent cause of action, even in the absence of a statute, which the creditors could not pursue until they obtained a judgment and execution thereon was returned unsatisfied.

[15]Cf. *Henderson* v. *Binkley Coal Co.*, 74 F. (2d) 567 (C. A. 2); *Austrian* v. *Williams*, 198 F. (2d) 697 (C. A. 2).

trian v. *Williams*, 198 F. (2d) 697 (C. A. 2); *Laird* v. *United Shipyards*, 163 F. (2d) 12 (C. A. 2).[2]

3. Since plaintiffs do not allege any fraudulent conveyance, the New York Debtor and Creditor Law—which dispenses with a judgment in such circumstances—does not apply. Therefore a suit of this kind, and old-fashioned creditor's suit, could not be maintained until plaintiffs had the equivalent of a judgment against Alton and an unsatisfied execution. Plaintiffs maintain, and we shall assume, that they first occupied that position on May 31, 1947, when the Alton bankruptcy proceedings terminated.[3] The statute of limitations, Section 53 of the New York Civil Practice Act, applicable to such an equitable action, fixes a ten-year period within which suit must be brought; and this suit began on May 7, 1952, within that ten-year period.

These facts, however, do not help plaintiffs. We shall assume that, within the ten years ending May 31, 1957, plaintiffs, by their suit, could levy an equitable execution on any of Alton's available assets, which the final decree in the Alton bankruptcy proceedings permitted plaintiffs to pursue. But, to succeed, plaintiffs must show that those assets on which they seek thus to levy—*i.e.*, Alton's claims against B & O—were available when the suit began in 1952. They were not then available, because, before 1952, the statute of limitations had run with respect to those

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[2]This interpretation, out of line with the interpretation of similar statutes in many other jurisdictions, seems harsh and inequitable. But, of course, we must abide by what the New York courts say its statutes mean.

[3]That is, they obtained the equivalent of a judgment on the allowance of their bondholder claims in the Alton bankruptcy proceedings; and the termination of those proceedings on May 31, 1947, with part of the amounts due thereon unpaid, was the equivalent of a return of execution unsatisfied.

claims.[4] For the pertinent period of limitations is either (a) three years, under the New York Civil Practice Act, Section 49 subdivision 7,[5] or (b) six years, under Section 48 subdivisions (1) or (8).[6]

In short, making assumptions most generous to plaintiffs, suit on the claims against B & O were barred on November 25, 1948, *i.e.*, six years from the appointment of Alton's bankruptcy trustee on November 25, 1942.

4. To be sure, the trustee was discharged on May 31, 1947. We shall assume that—thanks to the provision of the final decree in the Alton bankruptcy proceedings which gave the bondholders the right to pursue the claims, if any, against B & O—plaintiffs succeeded to Alton's right to sue B & O which had never been availed of by Alton's trustee. If so, on the most generous assumptions, plaintiffs' suit would not have been barred until November 25, 1948. But plaintiffs did not start suit until 1952.

We cannot accept plaintiffs' contention that the statute commences to run anew when a claim passes to an assignee of, or a successor to, one who could have sued thereon. An assignment, whether or not by "operation of law," has no

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[4]Our reasoning here differs from that of the district judge. But, in affirming a judgment, of course we may do so for reasons other than those of the court below.

[5]Section 49 subdivision 7 includes "an action to recover damages for an injury to property. * * *"

[6]Section 48 subdivision 1 includes an action upon a contract, express or implied, except a judgment and other exceptions not here relevant.

Section 48 subdivision 8 includes derivative actions against present and former directors, officers and stockholders for an accounting, for fraud, or to recover penalites or forfeitures imposed by statute or common law, but specifically excludes actions for waste or injury to property or for an accounting in connection therewith. For these latter actions, reference is made to Section 49 subdivision 7.

such resurrective or phoenix-like potency.[7] Nor, since Alton's trustee in bankruptcy could have asserted these claims, did the pendency of the bankruptcy proceedings toll the statute, since 11 U. S. C. Section 205(b)—which provides that "the running of all statutes of limitations shall be suspended"—has no application to a suit by a bankruptcy trustee. We think 11 U. S. C. Section 29(e) is applicable to railroad reorganization proceedings and carries the only suspension of statutes of limitation running against claims belonging to the debtor's estate.

5. The New York Civil Practice Act, Section 48(5) provides a six-year period of limitations as to actions for fraud, a period which begins to run only from the discovery of the fraud. Plaintiffs, however, do not allege Alton was a victim of the kind of fraud covered by that section as construed in the New York decisions. See *Austrian* v. *Williams, supra; Laird* v. *United Shipyards, supra,* and New York decisions there cited.[8]

Affirmed.

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[7]*Bucklin* v. *Bucklin,* 1 Abb. Ct. App. Dec. 242, 251; *Cooley* v. *Lobdell,* 153 N. Y. 596, 602-603.

Section 14 of the New York Civil Practice Act makes a specific exception of an action by a principal against his agent, an exception not relevant here.

[8]Even if that statute applied to the fraud here alleged, nevertheless the action would fail. For the discovery—of whatever fraud had been practiced by B & O—occurred on November 25, 1942, the date of the appointment of Alton's bankruptcy trustee.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of December one thousand nine hundred and fifty-five.

Present:

Hon. Jerome N. Frank,
Hon. Carroll C. Hincks,
Hon. Sterry R. Waterman,
Circuit Judges.

Norvin Rieser, *et al.*,
Plaintiffs-Appellants,

Emanuel Josephson, *et al.*,
Intervening Plaintiffs,

v.

The Baltimore and Ohio Railroad Co.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

MAR 2 3 195
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1955

No. 705

NORVIN RIESER, MILTON S. KOBLITZ, GEORGE S. CHAMPLIN, E. M. DART MFG. CO., LILLIAN BOEHM, BERNARD FEIN, KATHRYN P. BRAITHWAITE and EDWARD F. QUIRKE,
Petitioners,

and

EMANUEL JOSEPHSON, RUBIN SLAVSKY, RAYMOND WILEY and WILLIAM W. LANGE,
Intervening Petitioners,

against

THE BALTIMORE & OHIO RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

VICTOR HOUSE,
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PETITIONERS' REPLY BRIEF

Respondent's injection of the word "ancillary" neatly begs the question, but constitutes no argument. Petitioners' action is by definition ancillary to their own execution returned unsatisfied or its equivalent,—not to any claim of Alton. It is not, in any sense, "derivative", nor is Alton petitioners' "predecessor in interest".

The reasoning in the *Buttles* case does not depend on statute. Sections 60 and 61 of the General Corporation Law and Section 15 of the Stock Corporation Law merely declare and extend the common law. They in no wise abridge or diminish the general power of a Court of equity to aid an execution creditor. *Whalen et al.* v. *Strong*

et al., 230 App. Div. 617 (Fourth Dept., 1930); *Bailey* v. *Colleen Products Corporation et al.*, 120 Misc. 297 (1923); *McQueen* v. *New et al.*, 45 App. Div. 579 (First Dept., 1899). Cf. also *Stetson et al.* v. *Hopper et al.*, 60 App. Div. 277 (1st Dept., 1901).

Whether an action falls under the General Corporation Law (because it is against "officers and directors") or under the Stock Corporation Law (because it involves a "transfer") or is addressed to the general reserve power of equity, is immaterial to the distinction made in the *Buttles* and *Byllesby* cases between creditor suits, which are direct and do not arise until process returned unsatisfied, and other actions, which are derivative and may be maintained by the plaintiff without prior action against the principal debtor.

Dated: New York, March 23, 1956.

Respectfully submitted,

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